Cescon Engineers Sdn Bhd v Pesat Bumi Sdn Bhd and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C-163–07 OF 2020 AND WA-24C-176–08 OF 2020
ALIZA SULAIMAN J
30 SEPTEMBER 2021

Adjudication — Construction Industry Payment and Adjudication Act 2012 — Application to set aside adjudication decision ('AD') — Breach of rules of natural justice — Respondent held liable under adjudication decision ('AD') applied to set aside AD on ground adjudicator had decided dispute by relying on information that parties had never submitted upon or were called upon to address — Adjudicator had on own accord done searches on respondent and on project contractor (not party to adjudication proceedings) and concluded that blood relationship between directors and shareholders of the two companies had worked to unfairly reduce amount claimed by claimant in the adjudication proceedings — Whether adjudicator should have revealed results of his search to the disputing parties and given them opportunity to comment thereto and on the effect, if any, that the link between the two companies had on the certification and validity issue

The defendant ('PB') had appointed a contractor ('Geo Hill') to carry out a building construction and had also appointed the plaintiff ('Cescon') to provide engineering and project management consultancy services on an agreed percentage fee based on the total construction cost of the project. Once the final accounts for the project were completed, Cescon submitted its payment claim of RM2,163,990.88 but PB was only prepared to pay RM514,277.74 of that amount and disputed the balance. Cescon filed notice of adjudication of its claim under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). Following a hearing, the adjudicator allowed Cescon's claim and ordered PB to pay Cescon RM1,903,788.84 together with interest and other consequential costs. The instant applications before the court were an application by Cescon to enforce the adjudication decision ('AD') pursuant to s 28 of the CIPAA and two applications by PB — one to set aside the AD and the other to stay the AD pursuant to, respectively, ss 15–16 of the CIPAA. PB's main ground for setting aside the AD was that the adjudicator had breached the rules of natural justice when, without the knowledge of the parties and on his own initiative, the adjudicator had carried out an official search on both PB and Geo Hill (which was not a party to the adjudication proceedings) and concluded that the blood relationship between the directors and shareholders of both those companies led to an irresistible inference that any contractual arrangement between them in the instant case was not 'at arm's length' and that both PB and Geo Hill had colluded to reduce

the professional fees that was actually payable to Gescon. PB contended that the relationship between its directors and shareholders and those of Geo Hill was never an issue that required the adjudicator's consideration in the proceedings. In fact, PB contended, the information the adjudicator had derived from his official search on the two companies was inaccurate and he should therefore have given the parties to the adjudication the opportunity to clarify matters rather than have come to conclusions that were misconceived. PB argued that the search results on the companies had influenced the adjudicator to erroneously decide the adjudication to PB's detriment.

Held, setting aside the AD and dismissing the other applications:

(1) Whilst the adjudicator was endowed with wide powers under s 25 of the CIPAA, in so far as para (i) of that section was concerned, the power was not unfettered and was subject to the overriding requirement that the adjudicator must adhere to the rules of natural justice. Observance of the rules of natural justice mandated that the adjudicator in the instant case shared with the parties the information which he had obtained from the SSM search — and which he viewed as being material to the issues in the adjudication proceedings — and allowed the parties to comment on the same before delivering the AD (see para 37).

(2) Whilst the adjudicator was endowed with wide powers under s 25 of the CIPAA, in so far as paragraph (i) of that section was concerned, the power was not unfettered and was subject to the overriding requirement that the adjudicator must adhere to the rules of natural justice. Observance of the rules of natural justice mandated that the adjudicator in the instant case shared with the parties the information which he had obtained from the SSM search — and which he viewed as being material to the issues in the adjudication proceedings — and allowed the parties to comment on the same before delivering the AD: (a) in determining the sum for Mechanical and Electrical Works, the adjudicator took the view that the table prepared by PB's contract manager was erroneous and showed a clear attempt by PB to reduce the total construction costs for purposes of computation of Cescon's professional fees with the assistance of the Quantity Surveyor. The adjudicator than rejected VO No 2 and No 5 and replaced the sum of RM31,490,394 in the statement of final accounts for M & E Works with a higher sum of RM38,717,542; and (b) in dealing with the issue of omission of RM2,808,888 in VO No 6 for the aluminum and glazing works, the adjudicator opined that the table prepared by PB for these works was an afterthought to bolster PB's attempt to reduce Cescon's entitlement to professional fees. The adjudicator reviewed and revised the VO to reinstate the sum of RM11,693,088 which had been omitted in the statement of final accounts (see para 38).

(3) Procedural fairness dictated that the adjudicator should have shown the SSM search to the parties at the Clarification Meeting and given them an opportunity to comment on the search results and the effect, if any, of the relationship between the Leong brothers and their roles in PB and Geo Hill on the certification and validity issue. This was imperative especially in the light of the adjudicator's earlier ruling that the concerns raised by Cescon in respect of the issue of conflict had no merit as the claim was against PB. Against the background of such a ruling, PB would naturally have been taken by surprise when the 'relationship' appeared to have created a certain impression in the mind of the adjudicator and this led to the inference drawn by the adjudicator that PB had colluded with Geo Hill in an attempt to reduce Cescon's professional fees. The breach of natural justice that had occurred in this case was a material one and was not merely peripheral as it impacted on, at the very least, the adjudicator's findings as to VO No 7 where the sum of RM9,380,658 was reinstated for the Adjustment of Reinforcement BRC and Formwork Rate (see paras 39–40).

[Bahasa Malaysia summary

Defendan ('PB') telah melantik kontraktor ('Geo Hill') untuk menjalankan pembinaan bangunan dan juga telah melantik plaintif ('Cescon') untuk menyediakan perkhidmatan perundingan kejuruteraan dan pengurusan projek dengan bayaran peratusan yang dipersetujui berdasarkan jumlah kos pembinaan projek. Setelah akaun akhir projek selesai, Cescon mengemukakan tuntutan pembayarannya sebanyak RM2,163,990.88 namun PB hanya boleh untuk membayar RM514,277.74 daripada jumlah tersebut dan mempertikaikan bakinya. Cescon memfailkan notis penghakiman terhadap tuntutannya di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta'). Selepas perbicaraan tersebut, adjudicator telah membenarkan tuntutan Cescon tersebut dan memerintahkan PB membayar Cescon jumlah sebanyak RM1,903,788.84 bersama-sama dengan faedah dan kos berbangkit lain. Permohonan ini adalah permohonan oleh Cescon untuk menguatkuasakan keputusan adjudikasi ('AD') menurut s 28 Akta dan dua permohonan oleh PB — satu untuk mengenepikan AD tersebut dan yang lain untuk mengekalkan AD menurut, masing-masing, ss 15–16 Akta. Alasan utama PB adalah untuk mengenepikan AD adalah bahawa adjudikator telah melanggar prinsip keadilan semula jadi ketika, tanpa pengetahuan pihak-pihak dan atas inisiatifnya sendiri, adjudikator telah melakukan carian rasmi mengenai PB dan Geo Hill (yang bukan pihak kepada prosiding adjudikasi) dan memutuskan bahawa pertalian saudara antara pengarah dan pemegang saham kedua-dua syarikat tersebut membawa kepada kesimpulan bahawa sebarang perjanjian antara mereka dalam kes ini bukanlah antara 'pihak-pihak tidak berkepentingan' dan kedua-dua PB dan Geo Hill telah berpakat untuk mengurangkan yuran profesional yang sebenarnya perlu dibayar kepada Gescon. PB menghujahkan bahawa hubungan antara pengarah dan pemegang

sahamnya dan Geo Hill tidak pernah menjadi masalah yang memerlukan pertimbangan adjudikator di dalam prosiding tersebut. Malah, PB menghujahkan bahawa maklumat yang diperoleh oleh hakim dari carian rasminya mengenai kedua-dua syarikat tersebut adalah tidak tepat dan oleh itu dia sepatutnya memberi peluang kepada pihak-pihak untuk mengadili perkara-perkara tersebut dan bukannya membuat keputusan yang khilaf. PB berhujah bahawa hasil carian pada syarikat-syarikat telah mempengaruhi hakim untuk membuat keputusan adjudikasi salah yang menjejaskan PB.

Diputuskan, mengenepikan keputusan AD dan menolak permohonan-permohonan lain:

(1) Walaupun adjudikator diberikan kuasa yang luas di bawah s 25 Akta tersebut, setakat perenggan (i) peruntukan tersebut, kuasa tersebut tidak terhalang dan tertakluk kepada prinsip keadilan semula jadi. Mematuhi prinsip keadilan semula jadi memberi mandat kepada hakim dalam kes ini untuk berkongsi dengan pihak-pihak maklumat yang telah diperolehnya dari carian SSM — dan yang dilihatnya sebagai material kepada isu-isu dalam prosiding adjudikasi — dan membenarkan pihak-pihak untuk memberi hujahan mengenai perkara tersebut sebelum menyampaikan keputusan AD (lihat perenggan 37).

(2) Dengan merujuk kepada hasil carian SSM di dalam AD tersebut, ianya menimbulkan persoalan sejauh mana fikiran adjudikator telah dikaburkan dengan maklumat yang tepat menurut rekod SSM dalam mencapai keputusannya dan menolak perkiraan di dalam penyata akaun akhir yang telah disahkan oleh Juruukur Bahan. Peguamcara PB menunjukkan perkara ini dengan memetik bahagian-bahagian berikut alasan AD tersebut: (a) di dalam menentukan jumlah untuk Kerja Mekanikal dan Elektrikal, adjudikator memutusakan bahawa jadual yang disediakan oleh pengurus kontrak PB adalah salah dan menunjukkan percubaan yang jelas oleh PB untuk mengurangkan jumlah kos pembinaan untuk tujuan pengiraan yuran profesional Cescon dengan bantuan Juruukur Bahan. Adjudikator tersebut telah menolak VO No 2 dan No 5 dan menggantikan jumlah RM31,490,394 di dalam penyata akaun akhir untuk M & E Works dengan jumlah yang lebih tinggi sebanyak RM38,717,542; dan (b) mengenai isu peninggalan RM2,808,888 di dalam VO No 6 untuk kerja aluminium dan kaca, adjudicator berpendapat bahawa jadual yang disediakan oleh PB untuk kerja-kerja ini adalah pemikiran semula yang merupakan percubaan PB untuk menafikan hak Cescon untuk yuran professional tersebut. Adjudikator tersebut telah menyemak dan menyemak semula VO untuk mengembalikan jumlah RM11,693,088 yang telah ditinggalkan di dalam penyata akaun akhir (lihat perenggan 38).

(3) Keadilan prosedur menetapkan bahawa adjudikator sepatutnya

menunjukkan carian SSM kepada pihak-pihak di mesyuarat penjelasan dan memberi mereka peluang untuk menghujahkan mengenai hasil carian dan kesannya, jika ada, hubungan antara Leong brothers dan peranan mereka dalam PB dan Geo Hill mengenai isu Pensijilan dan Keesahan. Hal ini adalah penting terutamanya memandangkan keputusan adjudicator sebelum ini bahawa isu yang dibangkitkan oleh Cescon berkenaan dengan konflik dengan PB tidak bermerti. Dengan keputusan sedemikian, PB secara semula jadi akan terkilan apabila 'hubungan' tersebut nampaknya telah mewujudkan kesan tertentu dalam fikiran adjudikator dan hal ini membawa kepada kesimpulan yang dibuat oleh adjudicator tersebut bahawa PB telah berpakat dengan Geo Hill untuk mengurangkan yuran profesional Cescon. Pelanggaran prinsip keadilan semula jadi yang telah berlaku dalam kes ini adalah material dan bukan isu kecil kerana ianya memberi kesan kepada, adjudicator tersebut mengenai VO No 7 di mana jumlah RM9,380,658 telah dikembalikan semula untuk Pelarasan BRC Pengukuhan dan Kadar Acuan (lihat perenggan 39–40).]

Cases referred to

Balfour Beatty Construction Ltd v Lambeth London Borough Council [2002] EWHC 597 (TCC), QBD (refd)

Geoforce East Sdn Bhd v Melati Evergreen Sdn Bhd and another summons [2020] MLJU 1063; [2020] MLRHU 811, HC (folld)

SQA Builders Sdn Bhd v Luxor YRM Sdn Bhd and another suit [2018] 10 MLJ 759, HC (refd)

Samado Sdn Bhd v Kerajaan Malaysia [2020] MLJU 274; [2020] 5 MLRH 165, HC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 5, 6, 15, 15(b), (c), (d), 16, 24(c), 25, 25(d), (i), (m), 28

Rules of Court 2012 O 69A rr 2, 5

Alan Lim Wei Lun (John Heah & Co) in Originating Summons No WA-24C-163–07 of 2020 for the plaintiff.

Jack Yow Pit Pin (Kan Hui Ling with him) (Rahmat Lim & Partners) in Originating Summons No WA-24C-176–08 of 2020 for the plaintiff.

Alan Lim Wei Lun (John Heah & Co) Originating Summons No WA-24C-176–08 of 2020 for the defendant.

Jack Yow Pit Pin (Kan Hui Ling with him) (Rahmat Lim & Partners) in Originating Summons No WA-24C-163–07 of 2020 for the defendant.

Aliza Sulaiman J:

INTRODUCTION

[1] As is the usual practice, the court heard three applications together, with the agreement of the parties, Pesat Bumi Sdn Bhd ('PB') and Cescon Engineers Sdn Bhd ('Cescon'). These applications are set out below:

(a) the application by Cescon pursuant to s 28 of the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('the CIPAA'); O 69A rr 2 and 5 of the Rules of Court 2012 ('RoC 2012'); and/ or the inherent jurisdiction of the court in Originating Summons ('OS') No WA-24C-163–07 of 2020 (encl 1; 'enforcement application') to enforce the adjudication decision dated 19 June 2020 ('AD') by the learned adjudicator, Mr Harjeet Singh a/l Sardara Singh ('adjudicator');

(b) the application by PB pursuant to s 15 of the CIPAA and/ or the inherent jurisdiction of the court in OS No WA-24C-176–08 of 2020 (encl 1; 'setting aside application') to set aside the AD; and

(c) the application by PB pursuant to s 16 of the CIPAA and/ or the inherent jurisdiction of the court in OS No WA-24C-177–08 of 2020 (encl 1; 'Sstay application') to stay the AD.

[2] After having considered the cause papers and written submissions filed, and upon hearing the oral submissions by learned counsels who represented the parties, the court had allowed PB's setting aside application with costs of RM7,500, subject to allocator; dismissed Cescon's enforcement application with costs of RM3,000, subject to allocator; and dismissed PB's stay application with no order as to cost.

[3] PB is dissatisfied with the decisions in respect of the setting aside application and enforcement application and is now pursuing its right of appeal.

[4] My full grounds of judgment for the setting aside application and enforcement application are explicated in the ensuing paras.

BACKGROUND FACTS

[5] PB is a company incorporated in Malaysia and has its registered address at 40–1, Jalan Metro Pudu 2, Fraser Business Park, 55200 Kuala Lumpur. The nature of PB's business is as a general contractor and property developer.

[6] Cescon is a company incorporated in Malaysia and has its registered address at Lot 4.100, Level 4, Wisma Central, Jalan Ampang, 50450 Kuala

Lumpur. Its business is in engineering and project management, consultants including the provision of maintenance and other related services.

[7] PB is the employer of a project known as 'Cadangan Pembinaan Pangsapuri Perkhidmatan Yang Mengandungi: (A) 1 Blok Pangsapuri Perkhidmatan 38 Tingkat (507 unit) di Aras 7 Hingga Aras 44 dan 1 Tingkat Kemudahan Di Aras 7 Di Atas 8 Tingkat Podium Yang Mengandungi 6 Tingkat Tempat Letak Kereta Di Aras 'Upper Ground' hingga Aras 5, 1 Tingkat Lobi dan 'Drop Off' di Aras Bawah Dan 1 Tingkat Kemudahan M & E di Aras 'Lower Ground'; Dan (B) 1 Blok Pangsapuri Perkhidmatan 6 Tingkat (72 unit) Di Atas Lot PT 21079 Seluas 3.8 Ekar, Genting Permai, Mukim Bentong, Daerah Bentong, Pahang Darul Makmur' ('project').

[8] PB had appointed Geo Hill Construction Sdn Bhd ('Geo Hill') as the contractor for the project.

[9] PB and Geo Hill entered into two sets of agreements, both being the Agreement and Conditions of PAM Contract 2006 (With Quantities) ('PAM Contract') read together with the Amplifications and Supplementary Clauses to the PAM Contract, for the following works in the project:

(a) Stage 1 Works known as 'Earthworks, Retaining Walls, Bored Piling, Contiguous Bored Piling (CBP) and Foundation Works' for the contract sum of RM29,500,000 ('Stage 1 Works'); and

(b) Stage 2 Works known as 'Main Building Works' for the contract sum of RM198,500,000 ('Stage 2 Works'). The total value of works for Stage 1 Works and Stage 2 Works is RM228,000,000 (Stage 1 Works and Stage 2 Works are hereinafter collectively referred to as the 'works').

[10] By way of a letter dated 7 July 2014, Cescon provided to PB its Consultancy Fee Proposal for the provision of 'Civil & Structural Engineering and Mechanical & Electrical Engineering' services for the project. On 16 July 2014, PB acknowledged receipt of the said letter and confirmed the appointment of Cescon upon the terms and conditions as expressed in the letter ('LoA 1').

[11] Amongst the salient terms of LoA 1 are, inter alia, that:

(a) Cescon's total professional fees shall be 1.95% of the total construction costs of the project, subject to the Government Services Tax ('GST') of 6%;

(b) the fees shall be paid in proportion of services rendered upon completion of each stage of works and within seven days from the date of invoice issued by Cescon; and

(c) the proportion of payment shall be as follows:

1.	Upon approval of Layout Plans	5%
2.	Upon approval of Building Plan	10%
3.	Upon completion of Tender Drawings	5%
4.	Upon award of building works	5%
5.	Upon completion and issuance of construction drawings	5%
6.	Contract management & implementation stage	60%
7.	Upon issuance of the Certificate of Practical Completion ('CPC'), completion of as-built drawings, operation & maintenance manual & warranty certificates	2.5%
8.	Upon issuance of the Certificate of Completion and Compliance ('CCC')	2.5%
9.	Upon finalisation of accounts with the contractor	2.5%
10.	Upon issuance of the Certificate of Making Good Defects ('CMGD')	2.5%
Total		100%

[12] Subsequently, on 22 November 2014, PB wrote to Cescon ('LoA 2') to confirm the following:

(a) Cescon's fees shall be at 1.95% of the total construction cost which was provisionally estimated at RM140m and would be adjusted based on the actual and tender awards;

(b) Cescon is agreeable to contra 30% of its professional fees with properties from the project. Any adjustment to the professional fees shall be determined based on the property value to be decided when available. 6% GST shall be payable based on the full professional fees;

(c) the total construction cost shall not include the following items of work:

(i) all interior design works such as kitchen cabinets, built-in wardrobe, etc, which is at the discretion of the client to provide;

(ii) the water treatment plant built to cater to the need of the project and neighbour development;

(iii) the proposed centralised sewage treatment plant; and

(iv) any items not in the list shall be at the client's liberty to decide; and

(d) Cescon's scope of work shall cover the issuance of construction drawings and any subsequent revisions of designs for the full compliance and completion of the project.

[13] On 31 January 2020, Perunding Kos Bersatu Sdn Bhd issued the Statement of Final Account for Stage 1 Works for the amount of

RM29,500,000 ('Stage 1 Final Accounts'). This was followed with the issuance of the statement of final account for Stage 2 Works for the amount of RM198,500,000 on 7 February 2020 ('Stage 2 Final Accounts'; the Stage 1 Final Accounts and Stage 2 Final Accounts will hereinafter be collectively referred to as the 'statement of final accounts'). The final contract sum for Stage 1 Works and Stage 2 Works is thus RM228m ('final contract sum').

[14] Cescon claimed that it had completed Item Nos 1–9 in the table in subpara 11(c) above, which entitles it to 97.5% of the total consultant fee.

[15] Cescon then proceeded to issue its payment claim dated 10 December 2019 made under s 5 of the CIPAA wherein the particulars of the claim are summarised below:

Descriptions of the Works	Amount (RM)
(1) Total Contract Sum: (a) Contract Sum for Stage 1 Works (b) Contract sum for Stage 2 Works Total	 29,500,000 198,500,000 228,000,000
(2) Total value of Works claimed (1.95% of RM228,000,000 x 97.5%)	4,594,941 (including 6% GST)
LESS: (3) Contra with two units of properties in the project (4) Total amount previously paid Total Deduction	 892,413.12 1,538,537 2,430,950.12
Total Amount Outstanding	2,163,990.88

[16] PB served its payment response dated 3 January 2020 pursuant to s 6 of the CIPAA where based on its calculations, it admitted that a sum of RM514,277.74 has to be paid to Cescon. The balance claim amount of RM1,649,713.14 was disputed.

[17] Thereafter, the notice of adjudication, adjudication claim, adjudication response and adjudication reply dated 9 January 2020, 5 March 2020, 20 March 2020 and 6 April 2020, respectively, were issued.

[18] The adjudicator delivered the AD on 19 June 2020. In para 106 of the AD, he allowed Cescon's claim and ordered as follows:

1) The Respondent shall pay to the Claimant the following:-

(i) RM 1,903,788.84

(ii) the adjudicated sum shall be paid by 3.7.2020 and shall henceforth be called due date for payment of Adjudication sum;

(iii) the rate of interest payable is 5% per annum simple interest from 10.12.2019 until payment of adjudicated sum with interest accrued thereon

2) the Respondent shall bear 100% of the costs of adjudication. These include RM 29,578.10 cost of the adjudicator, RM 6,270.55 AIAC's fees, RM 30,000.00 Party and party costs, the cost of company search of RM 233.00 incurred by the Adjudicator to making the relevant inquiries via SSM e-info service (receipt enclosed) and cost of meeting room at AIAC for the sum of RM 1,005.68.

[19] On 28 August 2020, PB filed Civil Suit No WA-22C-84–08 of 2020 against Cescon and the prayers sought as stated in the statement of claim are, among others, for a declaration that under the consultant contract, Cescon is only entitled to a consultant fee of RM2,849,760.87 being 1.95% of the total construction costs of RM146,141,583.10 or such other sum as deemed fit by the court, special damages of RM67,087.33 and general damages to be assessed.

OS No WA-24C-176–08 of 2020: Setting aside application

[20] From the grounds as mentioned in the OS, PB's application to set aside the AD is premised on limbs (b), (c) and (d) of s 15 of the CIPAA in that the AD was improperly procured because the adjudicator has breached the rules of natural justice; the adjudicator has not acted independently or impartially; and the adjudicator has acted in excess of his jurisdiction.

[21] In these grounds of judgment, the discussion shall focus on limb (b) of s 15 of the CIPAA as the setting aside application was allowed solely on the ground that there has been a denial of natural justice.

PB's submissions

[22] PB drew an analogy with the facts in *Balfour Beatty Construction Ltd v Lambeth London Borough Council* [2000] EWHC 597 (TCC) in submitting on its main complaint against the AD, namely that the adjudicator had acted in breach of natural justice when he:

(a) proceeded to conduct a Companies Commission of Malaysia search ('SSM search') on Geo Hill, which is not a party to the adjudication proceedings, and on PB, without the knowledge of PB and Cescon and used the information in the SSM search without first showing a copy of the search to the parties;

(b) utilised information from the SSM search, which were actually inaccurate, to draw a link between the shareholders and directors of Geo Hill and PB without informing the parties that he intends to do so; and

(c) drew adverse inferences arising from the purported close relationship between the directors and shareholders of Geo Hill and PB so as to treat the contractual arrangements between Geo Hill and PB as being 'not at arms' length' without giving PB a chance to rebut or to address such allegations.

[23] With reference to the adjudicator's analysis in para 102 on 'Stage 2 Works' and subpara (vii) on 'Variation Order' and sub-subpara (b) on 'Adjustment of Reinforcement BRC and Formwork Rate as per Commercial Agreement Between Pesat Bumi Letter' ('pertinent para') where the adjudicator mentioned that his inquiries via the SSM search revealed that the Directors and shareholders of PB and Geo Hill ie Leong Poh Hoong and Leong Poh Whye ('Leong brothers'), respectively, are biological brothers, PB submitted that:

(a) the said relationship was never raised as an issue in the 'pleadings' filed by the parties and it was only raised by Cescon to support its application vide email dated 16 April 2020 to the adjudicator (see exh 'SCC1' in Cescon's affidavit in reply ('AIR'), encl 4) to recuse the architect and the quantity surveyor ('QS') from attending the clarification on 22 May 2020 ('clarification meeting');

(b) in response to the abovesaid application, the adjudicator stated in his letter dated 16 April 2020 (also in exh 'SCC1') that '... the facts and concerns raised by the Claimant [Cescon] as regards to the issue of conflict have no merits as the claim is against Pesat Bumi Sdn Bhd'. PB was thus under the impression that the relationship of the Leong brothers was a non-issue with regards to the merits of the adjudication since the adjudicator had rejected this as a ground to recuse the architect and the QS in a procedural ruling; and

(c) during the clarification meeting, the adjudicator did not pose any question to PB's representative regarding the effect, if any, of the relationship between the Leong brothers on the issues as to the computation of the construction costs and certification works under the PAM Contracts and/or the validity of the variation orders ('VO') issued under the same ('certification and validity issue'). However, the adjudicator relied on the results of the SSM search in dealing with the certification and validity issue to the detriment of PB.

[24] It was further contended by PB that in respect of the adjudicator's statement in the AD that 'Leong Poh Whye is a shareholder in both companies and holds 90% equity shareholdings in Geo Hill Sdn Bhd and 1% equity

shareholding in the Respondent company', had the adjudicator shown the CCM Search to PB during the adjudication proceedings, PB would have pointed out to the adjudicator that:

(a) as at the date of the adjudication, Leong Poh Whye was not a shareholder of PB and he had transferred his shares to Leong Poh Hoong on 12 October 2015; and

(b) Leong Poh Whye was not a Director of PB and as such, there is no common Directors and shareholders between PB and Geo Hill.

[25] Being aware of the provisions in s 25(d) and (i) of the CIPAA, PB argued that even though the adjudicator was statutorily empowered to draw on his own knowledge and expertise, and inquisitorially take the initiative to ascertain the facts and the law required for the decision, if the adjudicator embarks on these courses of action and formulates a new proposition, he must afford the parties the right to be heard before he decides on the issue and failure to do so means that the adjudicator has breached the rules of natural justice. Furthermore, the breaches are said to be material and not just peripheral.

Cescon's submissions

[26] In its AIR, Cescon gave its version of the events that transpired during the clarification meeting, namely that the adjudicator had:

(a) conducted the SSM search before the clarification meeting;

(b) informed all parties who attended the clarification meeting about the SSM search but PB's legal representatives and its project manager, Mr Hiew Thian You ('Mr Hiew') who represented PB, did not dispute or object to the adjudicator's conduct of conducting the SSM search and to the findings. PB also did not raise any objections with the adjudicator after the clarification meeting against the SSM search; and

(c) asked PB's representatives about the relationship between PB and Geo Hill as stated in the SSM search and they had verified the information.

[27] Cescon contended that the corporate connection between PB and Geo Hill is relevant because:

(a) Cescon disputed the validity of the VO, which were only issued by the architect after the issuance of the CPC, on the ground that the VO had contravened cl 11.3 of the PAM Contract;

(b) PB's stance was that PB and Geo Hill, being the parties to the PAM Contract, could elect to waive the application of cl 11.3 of the same; and

(c) Cescon took the view that PB had relied on the impugned VO to alter the Works that could impact the calculation of the total construction costs, thereby reducing Cescon's professional fees.

[28] Cescon's counsel relied on the decision in *SQA Builders Sdn Bhd v Luxor YRM Sdn Bhd and another suit* [2018] 10 MLJ 759 in submitting that there is no breach of natural justice because the parties were legally represented in the adjudication proceedings and were given equal and fair opportunity during the clarification meeting to present their side of the story. PB had never challenged the adjudicator's impartiality and independence during the adjudication proceedings and did not dispute or record its dissatisfaction against the manner in which the clarification meeting was conducted by the adjudicator.

[29] It was additionally argued that the adjudicator's decision did not emphasise on the relationship between PB and Geo Hill and instead the adjudicator had given detailed findings against PB's allegations on other grounds. PB is alleged to be cherry-picking the wordings in the AD and reading them in isolation without appreciating the entire AD. The very fact that the adjudicator had dismissed Cescon's request to recuse the attendance of the architect and the QS is testament of his independence and impartiality in his findings.

Analysis and findings of the court

[30] After having perused the averments and exhibits in the affidavits, I find that the following facts are established:

(a) on 14 April 2020, the adjudicator wrote to the solicitors representing the parties and referred to the direction given vide his letter dated 7 April 2020 and Cescon's letter via email dated 13 April 2020 (see exh 'A11' in PB's AIR, encl 5). By this letter, the adjudicator sought the agreement of the parties as to the common date for clarification for both parties and an extension of time for the adjudicator to deliver the decision;

(b) Cescon's solicitors replied via email on 16 April 2020 at 10.09am seeking clarification on the participation of the architect and QS and drew the attention of the adjudicator to the proximate and continuous working relationship among the Architect, QS, PB and Geo Hill (see exh 'SCC1' in Cescon's AIR, encl 4). Cescon informed the adjudicator that:

(i) the architect and QS were currently involved in other ongoing projects where PB is the employer;

(ii) Geo Hill is the in-house contractor of PB and the relationship between the Leong brothers was conveyed. The minutes of three client consultant meetings were included as Attachment C to the

email to support the contention that there are occasions when Mr Leong Poh Whye of Geo Hill would represent PB in said meetings; and

(iii) it was deeply concerned that the architect and QS could be in conflict of interest due to their ongoing working relationship with PB and the beneficial interests arising therefrom and hence, their attendance at the clarification meeting should be dispensed with.

(c) PB's solicitors then sent an email on the same date, 16 April 2020 at 2.50pm to refute the contents of Cescon's email (see the same exh 'SCC1'). According to PB:

(i) s 25 of the CIPAA gives the discretion to the adjudicator to conduct the adjudication as he sees fit and in particular, s 25(i) allows the adjudicator to inquisitorially take the initiative to ascertain the facts and the law required for the decision;

(ii) Cescon's email which seeks to disbar and discredit the architect and QS is wholly unwarranted and the attempt to cast aspersions on them even before the hearing is uncalled for and telling as to Cescon's intentions to suppress them and the relevant evidence;

(iii) Geo Hill is not a party to the current adjudication and the adjudicator has not directed that Geo Hill is to attend the clarification meeting; and

(iv) the attendance of the architect and QS is justified since this would allow PB to fairly ventilate its case.

(d) the adjudicator wrote a letter on the same date, 16 April 2020, to Cescon and copied to PB (exh 'SCC1') stating the following (Emphasis added.):

> ... 2. I wish to state that the dispute in this Adjudication Claim pertaining to the issue of construction costs and certification of works which inter alia will form the basis for my evaluation as to what is the appropriate consultancy fees to be adjudicated.
>
> 3. *At this stage, the facts and concerns raised by the Claimant as regards to the issue of conflict have no merits as the claim is against Pesat Bumi Sdn Bhd.*
>
> 4. Similarly *I do not find any merits based on settled principles of law for the recusal of both the Architect and Quantity Surveyor at the clarification meeting.*
>
> 5. For the record, *both parties to this adjudication can be assured that I will undertake an independent judicial appreciation all the evidence and facts presented to me thus far and to any other facts presented during the clarification meeting in consequences of my inquiries from the abovementioned consultants.*
>
> ...

(e) the adjudicator had conducted a company search on 6 May 2020 on the Company Profile; Financial Comparison (two years); and Particulars of Shareholders, Directors/ Officers and Share Capital for PB and Geo Hill at a cost of RM233 (see subpara 106(2) of the AD and Invoice Nos 18290733 and 18290846 which are enclosed to the AD);

(f) the clarification meeting was held on 22 May 2020 at a meeting room at the Asian International Arbitration Centre ('AIAC') and was attended by the architect and QS of the project upon the directive of the adjudicator; Cescon's solicitor, Mr Alan Lim Wei Lun; Cescon's Directors, Mr Sha Chaim Chuan and Mr Sha Kah Wei; PB's solicitors, Mr Kee Meng Fai and Ms Wee Zhenni from Messrs Belden; and Mr Hiew.

In the absence of any statement by the adjudicator in the AD which could assist to illuminate as to what exactly transpired during the clarification meeting on the issue of the SSM search (see paras 70, 77 and 79 and subparas 102(ii)(b) and (vii)(b) of the AD where the clarification meeting is mentioned), the court has considered the affirmations by PB and Cescon in their respective affidavits. In subparas 11(g) of PB's AIR and Cescon's AIR, both parties agree that the adjudicator had asked Mr Hiew as to the relationship between PB and Geo Hill. However, the parties are at extreme ends of the spectrum as to the response that was given by Mr Hiew. Cescon claims that Mr Hiew had confirmed the relationship between PB and Geo Hill as stated in the SSM search which must mean the fact that the directors and shareholders of the two companies are biological brothers. On the other hand, Mr Hiew averred that: (i) his answer to the adjudicator was that PB and Geo Hill are the developer and contractor in the project; (ii) the adjudicator did not show the SSM search to him; and (iii) the adjudicator did not ask about the effect, if any, of the relationship between the Leong brothers on the certification and validity issue. In this regard, the court accepts PB's averments on this matter as these were not a mere denial to Cescon's allegations that Mr Hiew 'had verified it' but consist of further statements of facts by PB. Cescon could have applied for leave of the court to file a further affidavit to PB's AIR (encl 5) but it did not do so. As such, PB's averments stand unrebutted;

(g) in the AD, the adjudicator identified three issues which require his determination, namely:

(i) the construction of the contract between Cescon and PB pursuant to LOA 1 and LOA 2;

(ii) the appropriate professional fees due and payable to Cescon based on the total construction cost in accordance to what the parties had agreed to; and

(iii) the determination of Cescon's entitlement of professional fees as

agreed by both parties are [sic] the LOA 1 and LOA 2. A

In order to fully understand the pertinent para (as underlined) in the AD in its proper context, the adjudicator's discussion on the adjustment made by PB's QS in Variation Order No VO7 ('VO7') resulting in an omission of RM9,380,568 from the total construction costs for Stage 2 Works ('said omission'), is re-reproduced in full below: B

> According to the final account as per Variation Order serial *No. VO7*, the Respondent's Quantity Surveyor has adjusted as an omission/deduction totaling *RM9,380,568.00* from the total construction costs for Stage 2 Works. This Variation Order was also dated 6.2.2020 which is very much after the issuance of Claimant's invoice dated 30.8.2019. The only supporting documents in the final account is a list of revised rates as to how the sum was reduced. C
>
> The reason proffered by the Quantity Surveyor was that since both parties namely the Respondent and the Main contractor had agreed to this new revised rates, he had thus included this sum in the Final Account. However, to a question posed during clarification meeting, the Quantity Surveyor agreed that Bill of Quantities (BQ) rates normally cannot be changed once a building contract has been executed. D E
>
> *It is pertinent to note that upon the Adjudicator's inquiries via company search from Suruhanjaya Syarikat Malaysia (SSM), pursuant Section 25 CIPAA 2012, both the Directors/ Shareholders of Pesat Bumi Sdn Bhd and Geo Hill Construction Sdn Bhd are biological brothers namely Leong Poh Hoong and Leong Poh Whye respectively. Leong Poh Whye is a shareholder in both companies and holds 90% equity shareholdings in Geo Hill Sdn Bhd and 1% equity shareholding in the Respondent company. Leong Poh Hoong who is the elder brother holds 475,000 shares in Pesat Bumi which represents a majority shareholding of 62.9% equity in the Respondent company.* F G
>
> During the clarification meeting no commercial Agreement was furnished despite my earlier directions vide my letter dated 14.4.2020 that directed the Quantity Surveyor to produce all relevant documents. Even assuming if such a commercial agreement existed, it is an agreement which is *not* an arm's length agreement. H
>
> Further the Variation Order was dated 6.2.2020 which is more than twelve (12) months after the issuance of the CPC for Stage 2 Works and in contravention of *Clause 30.10* of the *PAM Contract 2006* as the CPC was issued by the Architect was dated 17.1.2019. I
>
> I am mindful that the *PAM Contract 2006* for Stage 2 Works is between the Respondent and the Main Contractor. However, the circumstances of the issuance of the Final Account under the contract is a factor to be taken into account in the determination of the total construction costs

> for purposes of computation of the Claimant's entitlement of professional fees.
>
> Further pursuant to *Clause 12 and 13* under *PAM Contract 2006* provide that once the contract is signed, the rates of BQ cannot be changed. I am further fortified that in the Letter of Award dated 5.6.2016 from the Respondent to the Contractor in particular Clause 4 clearly stipulates that rates cannot be changed. (see *Schedule 4 of AC*)
>
> Therefore, based on the foregoing paragraphs and the want of supporting documents, the irresistible inference that this omission of *RM 9,380,568.09* is an afterthought by the Respondent to bolster its justification to reduce the total construction costs and thereby reducing the Claimant's entitlement of professional fees ...

(iv) Cescon and PB did not raise the relationship between the Leong brothers in the payment claim, payment response, adjudication claim, adjudication response and adjudication reply. The said relationship was first raised by Cescon in the email to the adjudicator dated 16 April 2020 in applying to dispense the attendance of the architect and QS at the clarification meeting and not in respect of the certification and validity issue.

[31] Based on the part of the AD as quoted above, whilst it is true that the adjudicator had, in justifying his decision to disallow the said omission for purposes of computation of Cescon's entitlement of professional fees, said that:

(a) the QS had, in answer to a question posed during the clarification meeting, agreed that the bill of quantities' rates cannot be changed once a construction contract has been executed;

(b) pursuant to cll 12 and 13 of the PAM Contract and cl 4 of PB's letter of award to Geo Hill, the bill of quantities' rates cannot be changed; and

(c) the VO is dated 6 February 2020 and was issued more than 12 months after the issuance of the CPC for Stage 2 Works on 17 January 2019, which is contrary to cl 30.10 of the PAM Contract,

nevertheless he had not only chosen to mention the fact that he conducted the SSM search which uncovered about the Leong brothers and their interests in PB and Geo Hill, but that the information is 'pertinent'.

[32] An explanation as to how, in the mind of the adjudicator, the information from the SSM search is germane is revealed in the para immediately succeeding the pertinent para where the adjudicator appears to have drawn an adverse inference as to the roles of the Leong brothers in PB and Geo Hill when he opined that even if there is a commercial agreement between PB and Geo Hill, it is 'not an arm's length agreement'.

[33] Furthermore, the adjudicator's decision was 'based on the foregoing paragraphs', which would include the pertinent para, in arriving at the 'irresistible inference' that the said omission is 'an afterthought' by PB 'to bolster its justification to reduce the total construction cost and thereby reducing the claimant entitlement of professional fees'.

[34] In the course of deliberating on the conflicting contentions and submissions of the parties in *Samado Sdn Bhd v Kerajaan Malaysia* [2020] MLJU 274; [2020] 5 MLRH 165, this court had said that:

> [22] It is trite that the courts will not review any adjudication decision on its merits. To quote the words of Ravinthran Paramaguru J (now JCA) in *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] MLRHU 192:
>
> > [10] It must be noted that *under CIPAA, there is no right of appeal against the decision of the adjudicator which is interim in nature or of temporary finality only. Section 15 has provided limited grounds on which the decision of the adjudicator may be set aside. Since an application under s. 15 is not an appeal, the decision of the adjudicator cannot be reviewed on merits*. In the instant case, the applicant has relied on the ground of breach of natural justice and excess of jurisdiction to set aside the decision of the adjudicator. In the premises, *the criticism of the adjudication decision by the applicant must clearly point to a breach of natural justice or a jurisdictional error in the adjudication process. Otherwise, the instant proceeding would be converted to a full blown appeal or a rehearing of the adjudication process*. (Emphasis added.)
>
> [23] The principles relating to the rules of natural justice applied in the context of adjudication have been dealt with in an innumerable number of cases, some of which are discussed by the learned authors Lam Wai Loon and Ivan YF Loo in *Construction Adjudication in Malaysia*, Second Edition, 2018, Sweet & Maxwell (see Chapter 9 on 'Duties and Obligations of an Adjudicator'
>
> – 'Adherence to the principles of natural justice' and Chapter 15 on 'Setting Aside of Adjudication Decision'
>
> – 'Section 15(b): Breach of Rules of Natural Justice').
>
> ...
>
> [24] In the course of His Lordship's judgment in *CJP Builders Ltd v William Verry Ltd* [2008] EWHC 2025 (TCC), Akenhead J discussed the issue of breach of natural justice as follows:
>
> > 79. ...
> >
> > ...
> >
> > (f) One of the entitlements of parties to an adjudication is a right to be heard, that being the rule of natural justice 'Audi Alterem Partes'. There is thus a reasonable expectation of parties to an adjudication that, within reason and within the constraints of the overall requirement to secure the giving of a decision within the requisite time period, each party's submissions and evidence

A will be considered by the Adjudicator ...

...

83. Reliance was placed upon my observations in *Cantillon Ltd v Urvasco Ltd* [2008] BLR 250 at paragraph 57:

B From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:

(a) it must first be established that the adjudicator failed to apply the rules of natural justice;

C (b) any breach of the rules must be more than peripheral; they must be material breaches;

(c) breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if D it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.

(d) whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree E which must be assessed by any judge in the case such as this.

(e) it is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties F an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case can be *Balfour Beatty Construction Company Limited v The London Borough of Lambeth* was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of G the rules of natural justice in relation to thereto.

[25] The learned Senior Federal Counsel ('SFC') representing the GoM has chosen to cite the case of Ranhill *E & C Sdn Bhd v Tioxide (Malaysia) Sdn Bhd & Other cases* [2016] 5 MLRH 472 wherein Mary Lim J (now JCA) had referred to a string of H English authorities which have elucidated on the approach and attitude of the Courts in respect of provisions similar to section 15 CIPAA. Her Ladyship had also quoted passages from the decisions in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWHC 778 and *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [2009] EWHC 2218 before stating that the applicant who claimed that there has been a denial of natural justice by the Adjudicator must I show inter alia:

(a) 'that the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to have been given the opportunity to comment upon if decisive or of considerable potential importance to the outcome of the resolution;

(b) that the adjudicator has gone off on a frolic of his own, ie, deciding a case based on a factual or legal basis which has not been argued or put forward by either side;

(c) that the adjudicator has decided on an issue or issues outside his jurisdiction;

(d) that the adjudicator deliberately took an enormously restrictive view of his own jurisdiction with the result that he decides not to consider an important or material element of the dispute referred to him'.

[35] In *Geoforce East Sdn Bhd v Melati Evergreen Sdn Bhd and another summons* [2020] MLJU 1063; [2020] MLRHU 811, this court said:

> [27] In so far as the requirements of natural justice under ss 24(c) and 15(b) of the CIPAA are concerned, it is also well recognised that the first limb to the rules of natural justice is that a man should not be the judge in his own cause (rule against bias) and the second limb is that the judge must hear both sides of the dispute (rule of audi alteram partem/ right to be heard). In the context of s 15(b) of the CIPAA, the function of the Court is to look at the manner in which the learned Adjudicator conducted the hearing and whether she had accorded procedural fairness to the appellant (see the decision of the Court of Appeal in *Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd & Anor Appeal* [2019] MLJU 35; [2019] 2 MLRA 538).

[36] In para 10.039 at p 259 of *Construction Adjudication in Malaysia* (2nd Ed, 2018, Sweet & Maxwell) by Lam Wai Loon and Ivan YF Loo, the learned authors penned that 'The rules of natural justice requires the adjudicator to inform the parties of the view he has formed independently of both parties and the information relied on by him which is obtained by his own initiative or investigation'.

[37] Applying the entrenched legal principles as laid down in the aforementioned case authorities to the present case, whilst the adjudicator is endowed with wide powers as provided under s 25 of the CIPAA, in so far as para (i) of the section is concerned, the power is not unfettered and is subject to the overriding requirement that the adjudicator must adhere to the rules of natural justice. Observance of the rules of natural justice mandates that the adjudicator shares with the parties the information which he has obtained as a result of the SSM search, and which he views as being material to the issues in the adjudication proceedings, and allow the parties to comment on the same before delivering the AD.

[38] By referring to the results of the SSM search in the AD, it begs the question as to the extent in which the adjudicator's mind was clouded by what he believed was accurate information as per the SSM records in arriving at his findings in rejecting the figures in the statement of final accounts that had been

certified by the QS. PB's counsel demonstrated this point by highlighting the following parts of the AD:

(a) at subpara 102(ii)(a), in determining the sum for Mechanical and Electrical ('M & E') Works, the adjudicator took the view that the table prepared by PB's Contract Manager is erroneous and '... leads to an irresistible inference of a clear attempt by the Respondent to reduce the total construction costs for purposes of computation of Claimant's professional fees with assistance of the Quantity Surveyor'. The adjudicator then rejected VO No 2 and VO No 5 and replaced the sum of RM31,490,394 in the statement of final accounts for M & E Works with a higher sum of RM38,717,542; and

(b) at subpara 102(vii)(a), in dealing with the issue of omission of RM2,808,888 in VO No 6 for Stage 2 Works pertaining to aluminum and glazing works, the adjudicator opined that the table prepared by PB for these works merely presents '... a deduction without including what was the final account figure for such item coupled with the Quantity Surveyor's certification of Variation Order without any credible supporting documents raised an irresistible inference that this Variation Order is an afterthought to bolster the Respondent's attempt to reduce the Claimant's entitlement of professional fees'. The adjudicator invoked the powers under s 25(m) of the CIPAA to review and revise the VO and reinstated the sum of RM11,693,088 which had been omitted in the statement of final accounts.

[39] I am in agreement with PB's submissions that procedural fairness dictates that the adjudicator should have shown the SSM search to the representatives of PB and Cescon at the clarification meeting and he should have given an opportunity to the parties to comment on the information in the SSM search and the effect, if any, of the relationship between the Leong brothers and their roles in PB and Geo Hill on the certification and validity issue. This is imperative especially in the light of the adjudicator's earlier ruling on 16 April 2020 that the facts and concerns raised by Cescon in respect of the issue of conflict have no merits as the claim is against PB. Against the background of such a ruling, PB would naturally be taken by surprise when the 'relationship' appears to have created a certain impression in the mind of the adjudicator and this led to the inference drawn by the adjudicator that PB had colluded with Geo Hill in an attempt to reduce Cescon's professional fees.

[40] The failure by the adjudicator to take the steps as outlined above has, in my considered view, occasioned a breach of natural justice. I further agree with PB's submission that the breach of natural justice in this case is a material breach and not merely peripheral as it impacted on, at the very least, the adjudicator's findings as to VO7 where the sum of RM9,380,658 was

reinstated for the Adjustment of Reinforcement BRC and Formwork Rate.

[41] In the premises, the setting aside application premised on limb (b) of s 15 of the CIPAA was allowed and there was therefore no necessity for the court to make a determinative finding as to limbs (c) and (d) of the same provision.

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[42] In view of the findings of the court in the setting aside application, the fate of the enforcement application is sealed. There is only one order that can be made in the circumstances of the case and that is to dismiss the enforcement application.

CONCLUSION

[43] Based on all of the above reasons, PB's setting aside application was allowed with costs of RM7,500, Cescon's enforcement application was dismissed with costs of RM3,000 and PB's stay application was dismissed with no order as to cost.

AD set aside and other applications dismissed.

Reported by Ashok Kumar